No. 95-1184

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
Petitioner,
v.
WILEMAN BROS. & ELLIOTT, INC., *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND DIRECT MARKETING ASSOCIATION IN SUPPORT OF RESPONDENTS

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BRIEF *AMICI CURIAE* OF AMERICAN ADVERTISING FEDERATION, AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, MAGAZINE PUBLISHERS OF AMERICA, AND DIRECT MARKETING ASSOCIATION IN SUPPORT OF RESPONDENTS

This brief is respectfully submitted pursuant to Rule 37 urging that the Court affirm the decision below of the United States Court of Appeals for the Ninth Circuit on the grounds that the mandatory federal agricultural commodity advertising programs at issue violate the Respondents' rights under the First Amendment to the Constitution of the United States.[1]

INTEREST OF *AMICI CURIAE*

Together, the *amici* herein represent thousands of advertising agencies, advertisers, broadcasters, publishers, and others who participate in the advertising industry, as well as individuals interested in preserving freedom of speech. It is from this broad-based, national perspective that the *amici* present their views to the Court. *Amici* are:

- The American Advertising Federation ("AAF"), a national trade association that traces its origins to 1903, representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio, and television broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters, with more than 6,000 student members. AAF members use virtually all forms of media to adver-

[1] Counsel for both Petitioner and Respondents have consented to the participation of *amici* in this case, as evidenced in letters filed with the Court.

tise and communicate with consumers throughout the United States.

- The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, formed in 1917, representing more than 600 advertising agencies with 2,000 offices located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertisements, as well as significant portions of local and regional advertising. Most clients of AAAA members are businesses selling goods or services to the public. AAAA is dedicated to advancing the interests of the advertising industry and has actively represented its members in connection with governmental efforts to restrict speech.
- The Magazine Publishers of America, Inc. ("MPA"), a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers. Its members represent almost 800 general interest consumer magazines ranging from journals of literature to special interest publications, to multi-million circulation magazines. MPA members provide broad coverage of domestic and international news and publish periodicals covering literature, religion, law, political affairs, science, agriculture, industry and many other interests, avocations and pastimes of the American people.
- The Direct Marketing Association ("DMA"), a non-profit corporation. DMA is the oldest and largest trade association serving the vast community in direct-to-the-consumer advertising and marketing, its predecessor organizations having been founded in 1917. Its members are firms engaged in or associated with marketing goods and services through direct response efforts, which include the use of catalogs and other printed materials distributed directly to consumers.

Amici respectfully submit this brief to vindicate the principle that commercial speech should be entitled to the same constitutional protection as non-commercial speech.

SUMMARY OF ARGUMENT

The text and history of the First Amendment, as well as the "long accepted practices of the American people," support the view that truthful commercial messages about lawful products and services should be accorded the same constitutional protection as is non-commercial speech. This position is confirmed by the practice of state legislatures at the time the Bill of Rights was ratified. Although states regulated trade, the only restrictions on advertising concerned the promotion of unlawful activities, such as lotteries or horse-racing. This absence of state regulation is consistent with the colonial conception of a "free press," which included advertising, and with the Framers' political philosophy, which equated liberty and property. Full protection of commercial speech is also consistent with the history of the First Amendment, which was adopted in part to bar stamp acts that imposed taxes directly on advertising.

Advertising grew essentially unchecked and unregulated throughout the nineteenth century. While the number of states and statutes increased, advertising continued to be barred where it was used to publicize unlawful products, services, or activities. In addition, towards the end of the century, some restrictions began to be adopted limiting false and misleading advertising. This Court's treatment of truthful advertising during and immediately after Reconstruction was indistinguishable from the treatment accorded other forms of speech.

As was the case with capitalism generally, the Progressive Era witnessed both an increase in the power of advertising and attempts to limit it. But even these attempts overwhelmingly focused on ensuring that advertising was truthful and not misleading. During this time, courts analyzed constraints on commercial speech under the rubric of substantive due process. This confusion of categories caused the Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), to erroneously treat restrictions on advertising as solely economic regulations subject only to rational basis scrutiny.

That error, which is in part perpetuated by this Court's continued distinction between commercial and non-commercial speech, conflicts with the "long accepted practices of the American people." Those practices—particularly state legislative practice at the times the First and Fourteenth Amendments were ratified by the states—support the contention that truthful commercial messages about lawful products and services are entitled to full First Amendment protection. Under that standard, the Secretary of Agriculture's mandatory advertising program is plainly unconstitutional.

ARGUMENT

At issue in this case is the appropriate test to be applied to the Secretary of Agriculture's regulations compelling California fruit growers to fund a "generic" advertising program whose message is determined by a committee of competitors appointed and supervised by the Secretary. *See, e.g.*, 7 U.S.C. §§ 608c(7)(C) & 610; 7 C.F.R. 916.20, 917.16-.25. The Secretary argues, among other things, that the forced advertising program is constitutional because of commercial speech's " 'subordinate position in the scale of First Amendment values' " Petitioner's Brief at 36 (quoting *Board of Trustees v. Fox*, 492 U.S. 469, 477 (1989)).[2] *Amici* demonstrate herein that, throughout most of this nation's history, the American people made no distinction between the constitutional protection for commercial and non-commercial speech.

These *amici* have previously addressed the central importance of advertising to the historical development of the American press and to the concept of the freedom of speech and of the press. *See, e.g.*, Brief of *Amicus Curiae* American Advertising Federation, *et al.*, *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (filed July

[2] That "subordinate position" is exemplified by this Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). Petitioners argue that the First Amendment rights of the fruit grower respondents are not even entitled to the lesser protections of the *Central Hudson* test. Petitioner's Brief at 20-21.

6, 1995). There, the Court acknowledged the importance of that historical context in unanimously striking down a state prohibition on advertising of liquor prices. The plurality opinion specifically referred to the historical materials discussed in our *amicus* brief, noting that:

> Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on "commercial speech" for vital information about the market. . . . . Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.

Id. at 1504 (Stevens, Kennedy, Souter & Ginsberg, J.J.) (citation omitted). Justice Thomas, relying in part on the historical analysis submitted by *amici*, rejected the notion that there was any "philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech." *Id.* at 1518 (Thomas, J., concurring in part and concurring in the judgment).

Justice Scalia, concurring in the judgment, noted his "discomfort with the *Central Hudson* test," as well as his "aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them." *Id.* at 1515 (Scalia, J., concurring in the judgment). Justice Scalia found the historical material submitted by AAF, *et al.*, "consistent with First Amendment protection for commercial speech, but certainly not dispositive." *Id.* He stated that "the long accepted practices of the American people" were central to interpreting the First Amendment, and inquired about (1) state legislative practices at the time the First Amendment was adopted; (2) state legislative practices at the time of adoption of the Fourteenth Amendment; and (3) "any national consensus that had formed regarding state regulation of advertising after the Fourteenth Amendment, and before this Court's entry into the field." *Id.*

In this brief, *amici curiae* review the relevant history and seek to address these and related issues. *Amici* respectfully submit that the state legislative history and practice, like the available evidence surrounding the understanding of the generation of the Framers, supports the proposition that, until relatively recently, the American people would not and did not recognize a distinction in the protections afforded "commercial" and "non-commercial" speech, other than the advertising of illegal activities and the protections afforded against fraudulent or misleading claims.

I. ADVERTISING WAS UBIQUITOUS IN THE EARLY AMERICAN PRESS.

The development of a free press and of a commercial, advertising-driven press were inextricably linked. Verner W. Crane, *Benjamin Franklin's Letters to the Press, 1758-1775* xvi (1950) ("It was a commercial age, and it produced a commercial press."). As a result, the modern distinction between "commercial" messages and other forms of speech would not have occurred to colonial Americans. The First Amendment permits the regulation of commercial messages concerning lawful products and services only to ensure that they are truthful and not misleading.[3] And, just as it does not otherwise countenance the suppression of those messages, the Constitution does not permit the forced expression of such messages to manipulate the marketplace.

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[3] The First Amendment was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation (as well as the torts of libel and slander). Sir William Blackstone acknowledged that "every kind of fraud is equally cognizable in a court of law." William Blackstone, 3 Commentaries on the Laws of England 431 (1768). *See also* Joseph Story, *Equity Jurisprudence* § 192 (1836) (defining misrepresentation); William F. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century).

A. Advertising Was an Integral Part of the "Press" in Colonial America.

The interrelationship between editorial and advertising content in the eighteenth century press illustrates the fallacy of differentiating for constitutional purposes between commercial and non-commercial speech. As one commentator has observed, "[w]ell before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising." James Playstead Wood, *The Story of Advertising* 85 (1958). Often, more than half of the standard colonial newspaper was taken up by advertising. Lawrence C. Wroth, *The Colonial Printer* 234 (1938). Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal interest to readers and treated the same. Kent R. Middleton, *Commercial Speech in the Eighteenth Century, printed in* Newsletters to Newspapers: Eighteenth-Century Journalism 277, 281 (Donovan H. Bond & W. Reynolds McLeod, eds., 1977).

The first daily newspaper in the United States was established in 1784 as a result of pressure for advertising space. When the Pennsylvania Packet and General Advertiser initially appeared, ten of its sixteen columns were filled with ads. Frank Presbrey, *The History and Development of Advertising* 161 (1929). The name of this paper (as well as that of New York's first daily, The New-York Daily Advertiser), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. *See also id.* at 154 ("Advertisements had as much interest as the news columns, perhaps greater interest . . . .").

The front pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising. Frank Luther Mott, *American Journalism—A History: 1690-1960* 157 (3d ed. 1963) ("Most dailies in

these years used page one for advertising, sometimes saving only one column of it for reading matter."); *see also* Wood, *supra*, at 85. The majority of the ads which appeared in colonial newspapers would today be considered "commercial speech." Middleton, *supra*, at 282 ("The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services.").

Without these ads, the vibrant colonial press so important to the Revolutionary cause would not have existed. During the Eighteenth Century, like today, "[a]dvertising represented the chief profit margin in the newspaper business." Mott, *supra*, at 56. As both a source of information to the population at large and a source of income to the colonial printers who played such an integral role in the struggle for freedom, advertising was both influential and plentiful during the latter part of the colonial era.

B. The Framers Themselves Advertised.

The ubiquitous role of advertising in early American society was reflected in the lives of our Founding Fathers. An early biographer of Ben Franklin credits him with having "originated the modern system of advertising." James Parton, *Life and Times of Benjamin Franklin* (1864), *reprinted in* Wood, *supra*, at 48. Franklin not only sold advertising to support his publishing efforts, he advertised in his own newspapers to promote the goods he sold in his Philadelphia shop. Wood, *supra*, at 48-49. As this Court has noted, Franklin's famous "Apology for Printers" came in response to an attack on a classic example of commercial speech. *See, supra*, p. 5.

George Washington, too, understood the effectiveness of advertising as both seller and buyer. To attract settlers to his land holdings in Ohio, Washington advertised in the July 15, 1773, Maryland Advocate and Commercial Advertiser and in a September issue of the Pennsylvania Gazette. Wood, *supra*, at 67. He also dispatched Major General Henry Knox of New York to obtain "superfine

American Broad Cloths" to outfit himself and his wife, of which he learned "from an Advertisement in the New York Daily Advertiser." Letter from George Washington to Henry Knox (January 29, 1789), *reprinted id.* at 69.

As these examples indicate, advertising permeated colonial life. Central figures in the struggle for independence actively advertised. Their experience reflects the common understanding that advertising was inseparable from the "press" of the day, and not a poor relative of "non-commercial" speech.

II. ALTHOUGH STATES REGULATED TRADE, THE SOLE ADVERTISING RESTRICTIONS WERE ON UNLAWFUL PRODUCTS AND SERVICES.

A review of state statutes in effect at the time surrounding the ratification of the Bill of Rights indicates that states did not exercise power over truthful commercial messages about lawful products or services.[4] Rather, consistent with the constitutions of the ten states that explicitly protected the freedom of the press,[5] the only re-

[4] This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. The Public Law of the State of South-Carolina (John Grimke 1790); The Laws of the State of New Hampshire (John Melcher 1797); The Laws of the State of Vermont (1797); The Public Laws of the State of Rhode-Island and Providence Plantations (1798); The Laws of the State of New Jersey (William Patterson 1800); The Laws of the State of New York (1802); Collection of All Such Acts of the General Assembly of Virginia (1803); The Public Acts of the General Assembly of North Carolina (James Iredell 1804); The Laws of the Commonwealth of Massachusetts from November 28, 1780 to February 28, 1807 (J.T. Buckingham June 1807); The Public Statute Laws of the State of Connecticut (1808); Laws of Maryland (Virgil Maxcy 1811); Digest of the Acts of the General Assembly of Pennsylvania (Mordecai M'Kinney 1841). All compilations are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

[5] Decl. of Rights, para. XII (Va. 1776); Decl. of Rights, para. XII (Pa. 1776); Decl. of Rights, para. XXIII (Del. 1776); Decl. of Rights, para. XXXVIII (Md. 1776); Decl. of Rights, para. XV

strictions on advertising were on the promotion of unlawful products, services, or activities.

A. State Legislatures Regulated Trades Widely, But Did Not Restrict the Advertising of Lawful Products and Services.

Conspicuously absent from trade regulation at the time are restrictions on the advertising of lawful activities. Early statutes show efforts to regulate merchants and shopkeepers,[6] liquor and taverns,[7] potash,[8] malt,[9] a variety

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(N.C. 1776); Ga. Const. art. LXI (1777); Decl. of Rights, para. IV (Vt. 1777); S.C. Const. art. XLIII (1778); Decl. of Rights, para. XVI (Mass. 1780); Bill of Rights, para. XXII (N.H. 1783). Two of those states—Pennsylvania and Vermont—connected that provision to protection for freedom of speech. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 441 n.55 (1983). Of the remaining four states in existence when the Bill of Rights was ratified, two—Rhode Island and Connecticut—had not drafted state constitutions; two others—New York and New Jersey—did not provide specific state constitutional guarantees of freedom of press and speech. *See* Leonard A. Levy, *Emergence of a Free Press* 189 (1985).

[6] *See, e.g.*, An Act for Punishing and Preventing Oppression, 1635, *printed in* The Public Statute Laws of Connecticut 544 (1808), *as amended* (1730).

[7] *See, e.g.*, An Act Regulating Licensed Houses, June 14, 1791, *printed in* The Laws of the State of New Hampshire 373-76 (1797); An Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, April 7, 1801, *printed in* Laws of the State of New York 484-90 (1802); An Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, *printed in* The Public Acts of the General Assembly of North Carolina 122-23 (1804).

[8] *See, e.g.*, An Act to Regulate the Exportation of Potash and Pearl-Ash, Nov. 1792, *printed in* The Laws of Maryland 191-92 (1811); An Act to Regulate Flax-Feed, Pot-ash and Pearl-Ash for Exportation, June 23, 1785, *printed in* The Laws of the State of New Hampshire 377-79 (1797).

[9] *See, e.g.*, An Act for the Better Making and Measuring of Malt, 1700, *printed in* The Laws of the Commonwealth of Massachusetts 987-88 (1807).

of commodities,[10] attorneys,[11] and doctors.[12] Among other things, these statutes required licenses, prevented charging of "unreasonable prices," and set standards for inspection and weighing of commodities.

The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, as tempered by the doctrine of *caveat emptor*. *See, e.g., Borrekins v. Bevan*, 3 Rule 23 (Pa. 1831) ("a sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty that the goods are what they described"); *see also supra* note 3; *see generally* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 Yale L. Rev. 1133 (1931).

B. The Only Restrictions on Advertising Prohibited the Promotion of Certain Unlawful Activities.

Legislative provisions in effect in the various states at the time the Bill of Rights was ratified indicate that the states did not restrict truthful advertising about lawful products or services. Nor did they compel advertising as a means of regulating trade. Rather, the sole restrictions

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[10] *See, e.g.*, An Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, Nov. 8, 1785, *printed in* The Laws of the Commonwealth of Massachusetts 253-257 (1807); An Act to Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Firewood, and to Regulate the Weighing of the Merchandise in this Province, June 17, 1746, *printed in* The Public Law of the State of South Carolina 208 (1790).

[11] *See, e.g.*, An Act Regulating the Admission of Attornies, Nov. 4, 1785, *printed in* The Laws of the Commonwealth of Massachusetts 251-52 (1807).

[12] *See, e.g.*, An Act to Regulate the Practice of Physic and Surgery, Nov. 26, 1783, *printed in* Laws of the State of New Jersey 51 (1800).

on advertising were on the promotion of certain prohibited activities.

For example, during the period surrounding ratification of the Bill of Rights, at least ten states prohibited or restricted lotteries. Seven of the statutes barring lotteries specifically prohibited their advertising and promotion. New Jersey, for one, enacted a statute in 1797 declaring that "all lotteries for money, goods, wares, . . . or other matters or things whatsoever, shall be, and hereby are adjudged to be common and public nuisances." Act of Feb. 13, 1797, *printed in* The Laws of the State of New Jersey 227-28 (1800).[13] The New Jersey act imposed separate penalties on those who "make or draw" such lotteries, and those who print, write or publish any account of where tickets were available or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery."

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[13] The statute exempted lotteries established under the authority of the United States or the New Jersey legislature. *Id.*, sec. V. Only Pennsylvania completely outlawed lotteries (and their advertisement). Act of Feb. 17, 1762, *printed in* A Digest of the Acts of the General Assembly of Pennsylvania 584-85 (1841) (setting 20 pound fine for, *inter alia*, advertising or causing to be advertised any lottery). Others followed New Jersey's lead and provided for government approval of a lottery. *See, e.g.*, Act of Nov. 8, 1785, *printed in* The Laws of the Commonwealth of Massachusetts 252-53 (1807) (providing separate fines for setting up lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had"), *amended by* Act of Feb. 28, 1801, *id.* at 8-9 (excepting lotteries, "authorized by a law of this Commonwealth, or of the Congress of the United States" and to specify a fine to be levied upon anyone who "shall aid and assist in any lottery established, or erected in any other of the United States, by advertising any Tickets of such lottery for sale, or by publishing the scheme for any such lottery"); Act of May 1723, *printed in* The Public Statute Laws of Connecticut 476-77 (1808), *as amended* (May 1791); Act of Nov. 1792, *printed in* The Laws of Maryland 189-90 (1811); Act of Feb. 14, 1791, *printed in* The Laws of the State of New Hampshire 299-300 (1797); Act of Feb. 14, 1783, *printed in* Laws of the State of New York 35-38 (1802); Act of Sept. 13, 1762, *printed in* The Public Law of the State of South-Carolina 256-67 (1790).

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited the staging—and advertising—of horse racing. Act of Oct. 1803, *printed in* The Public Statute Laws of the State of Connecticut 381-82 (1808); Act of Feb. 17, 1820, *printed in* A Digest of the Acts of the General Assembly of Pennsylvania 450-51 (1841). *Amici* found only one statute that restricted advertising within a regulated industry—and then for the purpose of ensuring that licensing laws were not flouted: Rhode Island prohibited the erection of a sign "for the keeping of a public house" without obtaining an inn-keeper's license. An Act Enabling the Town-Councils of Each Town In This State to Grant Licenses, 1721, *printed in* The Public Laws of the State of Rhode-Island and Providence Plantations 390-94 (1798).

Such restrictions on commercial speech comport with the common law, which considered it a criminal offense to "procure, counsel, or command another to commit a crime." William Blackstone, 4 Commentaries on the Laws of England 36 (1769) (defining an accessory before the fact); *Rex v. Higgins*, 2 East 5, 102 Eng. Rep. 269 (1801) ("A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases."); *see generally Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973). Thus, the only restrictions on advertising apparently extant during the colonial era are consistent with the notion that truthful advertising of lawful products and services was beyond the power of government.[14]

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[14] On occasion, state legislatures required advertising as a means of disseminating information necessary to protect the property or legal rights of others. *See, e.g.*, Act for Amending, and Reducing into System, the Laws and Regulations Concerning Last Wills and Testaments, Nov. 1798, *printed in* Laws of Maryland 457-50 (1811) (executors of estates were not liable for claims made after one year, if they inserted an advertisement announcing the estate in newspapers designated by the Orphans' Court); Act Relating to

C. The Absence of Advertising Restrictions Is Consistent With the Colonial Conception of a "Free Press" That Included Advertising.

Given the prevalence of advertising in colonial America, it is not surprising that the very idea of a free press evolved in close connection with the development of advertising. In fact, one of the major precipitating events of the American Revolution involved a defense of advertisements. The Stamp Act, which the Crown began enforcing in the colonies in 1765, taxed each newspaper—and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. John Lofton, *The Press as Guardian of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act was in large part based on their concern that it encroached on the freedom of expression. Arthur M. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1957). The repeal of the Stamp Act, one year after it had been applied to the colonies, "was a powerful victory for an independent press and for advertising." Presbrey, *supra*, at 151.

Only five years after adopting a state constitution explicitly guaranteeing freedom of the press, Mass. Decl. of Rights para. XVI (1780), Massachusetts enacted a similar stamp tax on all newspapers and almanacs. This was followed by a tax on newspaper advertisements. Eric Nessier, *Charging for Free Speech: User Fees and Insurance In the Marketplace of Ideas*, 74 Geo. L.J. 257, 264 (1985) (citing Clyde A. Duniway, *The Development of Freedom of the Press in Massachusetts* 132-36 (1966)).

Deserters, 1741, *printed in* Public Acts of the General Assembly of North Carolina 64 (1804) (requiring the jailer of a runaway slave to advertise, at the cost of the rightful owner, in the Virginia or South Carolina Gazette). Statutes that ensure the widespread dissemination of legal notice, consistent with ancient traditions, are a far cry from government-compelled advertising to manipulate the market or as a means to regulate trade.

These taxes were widely denounced both within and without the state as an "unconstitutional restraint on the Liberty of the Press.'" Carol S. Humphries, "*That Great Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788*, 14 Journalism Hist. 34, 37 (1987) (quoting Isaiah Thomas, Essex Journal, Apr. 19, 1786 and Massachusetts Gazette, Apr. 24, 1786). Repeal of the advertising tax in 1786 was cited as a great victory for "Freedom of the Press." *Id. See also Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936) (noting that "[t]he framers were likewise familiar with the then recent Massachusetts episode; and . . . that occurrence did much to bring about the adoption of the [First Amendment]").

Advertising was thus not only a daily influence on early American life, it was also immutably tied to the rights sought to be protected by the First Amendment. As one commentator of the day noted,

> Stamp duties also, imposed on every *commercial* instrument of writing—on *literary productions*, and, *particularly*, on *newspapers*, which of course, will be a great discouragement to *trade*; an obstruction to *useful knowledge* in *arts, sciences, agriculture, and manufacturers*, and a prevention of *political information* throughout the states.

Objections by A Son of Liberty, New York Journal, Nov. 8, 1787, *reprinted in* 6 *The Complete Anti-Federalist* 34, 36 (Herbert J. Storing ed. 1981) (emphasis in original).

D. The Absence of Restrictions on Advertising Is Consistent With the Framers' Political Philosophy, Which Equated Liberty and Property.

The inextricable link between commercial and other speech reflects the Framers' political philosophy, which generally equated liberty and property rights. As one newspaper commentator put it, "*Liberty* and *Property* are not only join'd in common discourse, but are in their own natures so nearly ally'd that we cannot be said to possess

the one without the enjoyment of the other." Boston Gazette, Feb. 22, 1768, *quoted in* Clinton L. Rossiter, *Seedtime of the Republic* 379 (1953) (emphasis in original).[15]

The generation of the Framers firmly believed in the tie between liberty and property. For example, George Mason's Virginia Declaration of Rights stated that among the natural rights of man was "the Enjoyment of Life and Liberty, with the Means of acquiring and possessing Property, and pursuing Happiness and Safety." Va. Declaration of Rights § 1, *reprinted in* Helen H. Miller, *George Mason: Gentleman Revolutionary* 340 (1975).

Applying this view to the freedom of expression, Cato explained the importance of free speech and its inextricable link with property rights as follows:

> This sacred Privilege is so essential to free Government that the Security of Property, and the Freedom of Speech, always go together; and in those wretched Countries where a Man cannot call his Tongue his own, he can scarce call any Thing else his own.

1 *Cato's Letters* 95-103 (Essay No. 15, Of Freedom of Speech: That the Same is Inseparable From Publick Liberty, Feb. 4, 1720).[16]

Distinguishing between the value of commercial and non-commercial speech thus would never have occurred

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[15] This philosophy was based on that of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of nature, without asking leave, or depending upon the will of any other man." John Locke, *Second Treatise on Government* ch. 2, § 4 (1790); *see also* John Trenchard & Thomas Gordon, 2 *Cato's Letters* 244-45 (1733).

[16] Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America. Jeffrey A. Smith, *Printers and Press Freedom: The Ideology of Early American Journalism* 25 (1988). In fact, Cato's *Essay on Free Speech*, first printed in America by Benjamin Franklin in 1722, contained the seed of the First Amendment's press clause. *See generally* David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 Md. L. Rev. 429, 444 (1983).

to the Framers, who essentially regarded all rights, including the right to free speech, as a form of property right shielded from government interference. For example, echoing Locke and Cato, James Madison wrote:

> In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have right; and which leaves to every one else the like advantage.
>
> In the former sense, a man's land, or merchandize, or money is called his property.
>
> In the latter sense, *man has a property in his opinions and the free communication of them* . . . .

James Madison, *"Property"*, The National Gazette (March 27, 1792), *reprinted in* James Madison, 14 *Papers of James Madison* 266-68 (Robert A. Rutland & Thomas A. Mason, eds. 1983) (emphasis in original). *See also id.* ("as a man is said to have a right to his property, he may be equally said to have a property in his rights . . . .").

Given this equation of liberty and free speech as forms of property, eighteenth-century printers who published advertising-laden newspapers believed that they were exercising the natural right to control their property. Much of the previously noted opposition to the taxes imposed on the press—including taxes on advertising—by the various Stamp Acts was based on their perceived offense to property rights. *See, e.g.*, Middleton, *supra*, at 280-81.

In keeping with this recognition that advertising was a critical part of the press whose freedom the Framers sought to guarantee, the text of the First Amendment draws no distinction between the commercial and non-commercial aspects of the press. The purpose of the Press Clause, as Madison said when the First Amendment was reported out of the House select committee, was to expressly declare "the liberty of the press . . . to be beyond the reach of government." 1 *Annals of Congress* 738 (1789), *reprinted in* 5 *The Founders' Constitution* 129 (Philip B. Kurland & Ralph Lerner, eds., 1987). There

is simply no evidence that the First Amendment places "beyond the reach of government" just that part of the press which contained political or other non-commercial speech.

III. STATE LEGISLATIVE PRACTICE AT THE TIME OF PASSAGE OF THE FOURTEENTH AMENDMENT IS CONSISTENT WITH THE VIEW THAT TRUTHFUL COMMERCIAL MESSAGES REGARDING LAWFUL PRODUCTS AND SERVICES ARE ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

The conclusion that truthful messages about lawful products or services are entitled to full constitutional protection is also confirmed by an examination of state legislative practices at and around the time the Fourteenth Amendment was ratified. This period marked a robust increase in the prominence and utility of advertising. States, while adopting some restriction on advertising that reflected the general movement from the common law tradition to increased reliance on statutes, *see, e.g.*, Morton Keller, *Affairs of State* 347 (1977), continued to focus their regulatory efforts on limiting advertising for illegal products and services.[17]

A. Commercial Speech Was an Integral Part of American Life During Reconstruction.

Advertising was "vigorous and thriving by the mid-nineteenth-century mark." Wood, *supra*, at 158. As one publisher in 1847 observed, "advertising is news. People wanted to read it just as much as they wanted to read the reports of the day's happenings." *Id.* at 159-60. To illustrate, a typical issue of the New York Herald in 1860

[17] This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law around the time of incorporation. *Amici* also examined the Territorial Codes of Utah, Washington, Wyoming, and New Mexico. We were unable to examine the State Code of Wisconsin, but did examine the other thirty-seven states admitted to the union by 1880.

carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter. *Id.* at 166-167; Mott, *supra*, at 298, 397-98, 593-94. Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers. Mott, *supra*, at 397; Presbrey, *supra*, at 259.

Although the Civil War may have pushed advertising from the front page, the demonstrated ability of advertising to sell Union war bonds led to a vast expansion in advertising's use. Presbrey, *supra*, at 253. A year after the close of the Civil War:

> [e]very rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.

Wood, *supra*, at 182; *see also Presbrey, supra*, at 255.

B. State Legislative Practice During Reconstruction Is Consistent With Full First Amendment Protections for Truthful Commercial Speech Promoting Lawful Products and Services.

Even as advertising emerged as an increasingly powerful societal force, state governments allowed it to grow unchecked, primarily restricting the promotion of illegal products or services only.[18] The restrictions on advertis-

[18] For example, as before, a number of states restricted lottery advertising. *See, e.g.*, Cal. Penal Code, ch. 9, § 323 (1872); Conn. Gen. Stat., tit. 12, ch. 8, § 150 (1868); Del. Rev. Stat., chap. 98, v. 12, § 6 (1874); Digest of Stat. Laws of Fla., ch. 50, § 5 (1872); Iowa Code, tit. 24, ch. 11, § 4043 (1873); Compiled Laws of Kan., ch. 31, art. 14, § 342 (1885); Ky. Rev. Stat., ch. 28, art. 21, § 4 (1860 and 1866 Supp.); Me. Rev. Stat., ch. 128, tit. 11, § 3 (1871);

ing that did exist were aimed at the illegality of the advertised conduct, rather than advertising itself. For example, Delaware proclaimed advertising by *unlicensed* lottery retailers only to be barred. Del. Rev. Stat., ch. 98, v. 12, § 6 (1874). Similarly, Vermont barred the advertising of lotteries "not authorized by the law of this state or of the United States." Vt. Stat., ch. 119, tit. 34, § 7 (1870).[19]

Also during this time, in response to an aggressive anti-abortion campaign beginning in the 1840s, many states adopted extensive abortion restrictions. James C. Mohr, *Abortion in America* 147-170 (1978). Some of these restrictions imposed penalties on "[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage] . . . ." Conn. Gen. Stat., tit. 12, ch. 2, § 25 (1866).[20] Other then-

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Md. Code, art. 30, § 114 (1860 and 1868 supp.); Miss. Gen. Stat., ch. 206, § 28 (1866); Compiled Laws of Nev., ch. 60, § 2498 (1873); N.Y. Rev. Stat., ch. 20, tit. 8, art. 4, § 53 (1875); Organic Laws of Or., Crim. Code, ch. 8, tit. 2, § 661 (1874); Compiled Laws of Terr. of Utah, ch. 9, § 2002 (1876); Vt. Gen. Stat., ch. 119, tit. 34, § 7 (1870).

[19] Significantly, the products, services, or activities that could not be advertised in the colonial and Reconstruction eras were prohibited in their entirety (e.g., unlicensed inn-keeping, illegal horse-racing and lotteries). Such activities, when lawful, could be advertised. There is, accordingly, no basis for relying on such statutes as a justification for upholding advertising restrictions on products that may lawfully be marketed to the overwhelming majority of the population. *See Dunagin v. City of Oxford*, 718 F.2d 738, 743 (5th Cir. 1983) (en banc) (protection of commercial speech "would disappear if its protection ceased whenever the advertised product might be used illegally").

[20] *See also* Cal. Penal Code, ch. 8, § 311(4) (1872); Digest of Stat. Laws of Fla., ch. 48, § 10 (1822); Compiled Laws of Kan., ch. 31, art. 14, § 342 (1885); Md. Code, art. 30, § 1 (1868 supp.); Mass. Gen. Stat., ch. 165, § 10 (1860 and 1877 supp.); N.J. Rev. Stat., Crimes, I., c., § 44 (1874); N.Y. Rev. Stat., Pt. IV, ch. 1, tit. 6, § 78 (1875); Ohio Rev. Stat., ch. 27, § 32 (1868 supp.); R.I. and Providence Plantations Gen. Stat., ch. 232, tit. 30, § 23 (1872);

illegal products or activities that could not be advertised included prize fights, Compiled Laws of Kan., ch. 31, art. 14, § 338 (1885), and obscene books, Cal. Penal Code, ch. 8, § 311(4) (1872); Compiled Laws of the Terr. of Utah, ch. 8, § 162 (1876). Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising. *See* W. Va. Code, ch. 149, § 11 (1870); N.Y. Rev. Stat., Pt. IV, ch. 1, tit. 6, § 77 (1875); Compiled Laws of Kan., ch. 31, art. 14, § 338 (1885).

The prevalence of advertising led to state protection of the property interests of advertisers, through statutes prohibiting the unauthorized removal of advertising.[21] States also sought to prevent advertisers from trespassing on the property rights of other citizens, by penalizing the placement of advertising in unauthorized locations.[22]

Although there was a noticeable absence of legislation during this period to bar false and misleading advertising of lawful products and services—and no record of advertising regulations serving other purposes—as advertising increased, so too did the recognition that, if false, it could cause harm. Thus, beginning around 1864, certain more successful newspapers refused to accept ads for questionable patent medicines and quacks. Wood, *supra*,

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Compiled Laws of Terr. of Utah, ch. 8, § 162 (1876). Notably, these restrictions on abortion advertising applied with equal force to all speech regarding abortion, commercial or noncommercial.

[21] *See, e.g.*, Ky. Rev. Stat., ch. 28, art. 26, § 1 (1860 and 1866 supp.); Mo. Gen. Stat., ch. 206, § 47 (1866); Neb. Rev. Stat., Pt. III, ch. 12, § 144 (1866); N.H. Gen. Stat., ch. 263, tit. 29, § 10 (1867).

[22] *See* Me. Rev. Stat., ch. 127, tit. 11, § 8 (1871); Mass. Gen. Stat., ch. 349 (1860 and 1877 supp.); R.I. and Providence Plantations Gen. Stat., ch. 230, tit. 30, § 31 (1872). The most prevalent state legislative interaction with advertising during the Reconstruction era was in the mandatory use of advertising to give legal notice. For example, state codes required notice via advertising for executors' sales, partitions of land, limited partnerships, liens, or even impounded beasts. Eighteen of thirty-seven states examined in this period required some type of advertising as a form of legal notice.

at 180. Indeed, many papers warned their readers against these disreputable advertisers. And in 1872, the national government enacted regulations aimed at restricting the dissemination of fraudulent ads through the mail. *See* Post Office Department Fraud Order of 1872, Act of June 8, 1872, ch. 335, § 300, 17 Stat. 322-23 (currently codified at 39 U.S.C. § 3005) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined to have fraudulently obtained money or property via mail).

To the extent that this Court addressed issues relating to advertising during and immediately after Reconstruction, its decisions were consistent with the view that advertising should be accorded the same protection as other forms of speech. To illustrate, in *Ex parte Jackson*, 96 U.S. 727 (1877), the Court held that Congress's 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion primarily dealt with Congress's power over the postal system, stating that "[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded." 96 U.S. at 732. But this Court treated lottery advertisements in the same way that it treated material that today would be fully protected by the Constitution. Thus, the Court "considered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other." Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747, 765 (1993); *see also In re Rapier*, 143 U.S. 110 (1892).

IV. LOWER PROTECTION FOR COMMERCIAL SPEECH IS A TWENTIETH-CENTURY PHENOMENON THAT HAS ITS ORIGINS IN A DISENCHANTMENT WITH ECONOMIC LIBERTIES AND CONFUSION WITH ECONOMIC SUBSTANTIVE DUE PROCESS.

A. Advertising Experienced Unprecedented Growth and Prestige Until the Depression.

As the economy boomed in the late 1800s, so did advertising. By 1898, a survey by the Press and Printer of Boston counted 2,583 companies that advertised in regular periodicals of general circulation. Presbrey, *supra*, at 362. The 1904 St. Louis World's Fair recognized the growth of the industry and staged "Ad-Men's Day" with a meeting grandly named "The International Advertising Association." George French, *20th Century Advertising* 119 (1926).

In the first few decades of the Twentieth Century, advertisers reached new heights in public prestige and prevalence. Advertisements during World War I helped to sell $24 billion in war bonds to 22 million Americans and raise $400 million for the Red Cross. Presbrey, *supra*, at 565. One observer remarked:

> Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success.

Id. at 566. As was the case after the Civil War, this widespread recognition of the power of advertising in war was not lost on manufacturers and retailers when peace returned.

Advertising's ascendancy continued into the 1920s. As President Coolidge remarked at the 1926 International Advertising Association's Washington convention:

> The preeminence of America in industry . . . has come very largely through mass production. Mass

> production is only possible where there is mass demand. Mass demand has been created almost entirely through the development of advertising."

Presbrey, *supra*, at 598.

Business appeared to believe President Coolidge's assessment of advertising's value. Total investment in advertising soared from $1.5 billion in 1918 to almost $3 billion in 1920 and continued to grow throughout the decade. Wood, *supra*, at 364-365.[23]

The Depression hit advertising hard not only in terms of income, but perhaps more importantly in public esteem. Following the stock market crash, advertising revenues tumbled from $3.4 billion in 1929 to $1.3 billion in 1933. Wood, *supra*, at 417. Just as advertising was perhaps irrationally credited for the boom years, so too was it a target for blame as the Depression took hold. It was not just an attack on advertising, however, because "the entire economic system of which advertising was seen as a vociferous, raucous and treacherous part, was under attack." *Id.* at 418.

B. The Increase in the Assertion of State Power Over Advertising Went Hand-In-Hand With a Growing Disenchantment With Economic Liberties.

As the Gilded Age gave way to the Progressive Era, disenchantment with unfettered capitalism grew. *See, e.g.*, Matthew Josephson, *The Robber Barons* 445-53 (1934). The notion that civil liberties were different from property rights and economic liberties began to take hold. *See generally* Richard Hofstadter, *The Age of Reform* (1974). This division, which was shared neither by the generation that ratified the First nor the Fourteenth Amendment, paved the way for the development and growth of the modern regulatory state.

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[23] Part of this growth stemmed from the use of radio as a new advertising medium. Although the first radio ad did not air until 1923, by 1929 the industry received an estimated $15 million in advertising revenues for its roughly 500 broadcast stations. Presbrey, *supra*, at 578.

Advertising was not immune from the perception that a larger governmental role was needed to check the unrestrained exercise of property rights. Magazines that once had accepted the patent medicine advertisers—such as the *Ladies Home Journal* and *Colliers*—led the charge to expose their fraudulent claims in 1904 and 1905. Wood, *supra*, at 327-330. Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims. *Id.* at 334.[24]

These and other concerns caused the advertising industry in 1911 to push for a model statute barring "untrue, deceptive, or misleading" advertising. *See* Hurnard J. Kenner, *The Fight for Truth in Advertising* 27 (1936). At that time, only New York and Massachusetts had statutory provisions barring fraudulent advertising, which had been adopted in 1904 and 1902, respectively. N.Y. Penal Code, art. 40, § 421 (1904); Mass. Rev. Laws, ch. 208, § 1 (1902). By 1920, 37 states had adopted the Advertising Federation of America's model anti-fraud statute. Wood, *supra*, at 336. Although politically significant and popular, these state legislative efforts largely represented a codification of longstanding common-law restrictions on false or misleading commercial messages. *See* n.3, *supra*.

The Depression spurred calls for increased restrictions on advertising. Advertising was attacked as wasteful; its critics charged that it did nothing more than add to the consumers' cost. As one observer described the national search for the cause of the Depression:

> [t]here had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Adver-

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[24] The public outcry against adulterated and dangerous foods and drugs ultimately led to passage of the federal Food and Drug Act of 1906, which forced manufacturers to justify their claims and list a product's ingredients. *Id.* at 333.

> tising was to blame, and shrill cries arose for its annihilation.

Wood, *supra*, at 418. Public skepticism about the role of advertising in the American economy rose significantly.[25]

The federal government aggressively responded to the perceived excesses of advertising.[26] Indeed, Professor Bruce Ackerman has argued that these and other changes brought about by the New Deal amounted to a decisive watershed in constiutional law. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 510-514 (1989). *See also* David Yassky, *Eras of the Fifth Amendment*, 91 Colum. L. Rev. 1699 (1991) (defining the New Deal as one of three "First Amendment Eras").

C. The Origins of the Distinction Between Commercial and Non-Commercial Speech Indicate Its Misguided Heritage.

As is well known, even as disenchantment among the body politic with economic liberties led to increased state regulation of the economy, this Court acted as a brake on that sentiment, employing the doctrine of substantive

[25] The consumers' movement also formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs, Eat, Drink and Be Wary*, and *Partners in Plunder*. *Id.* at 419-420.

[26] For example, Rexford Guy Tugwell, a Columbia University economist who was appointed an Assistant Secretary of Agriculture by President Roosevelt, had written extensively regarding "the waste and extravagance of advertising which merely attempted to turn sales from one company to that of another making a product identical in value." Wood, *supra*, at 426. Tugwell championed sweeping federal legislation to centralize grade labeling, define false advertising, and centralize enforcement in the Secretary of Agriculture. *Id.* Tugwell's Agriculture Department spurred the Agricultural Marketing Agreement Act of 1937, which "illustrated the New Deal's commitment to collective capitalism." Harold F. Breimyer, *The New Deal and Its Legacy: Agricultural Philosophies and Policies in the New Deal*, 68 Minn. L. Rev. 333, 344 (1983) (citation omitted). An amendment to that Act authorized the forced advertising program at issue here.

due process to strike down many state laws. Mistakenly, advertising came to be analyzed under this category, instead of under the First Amendment, where it belonged. This confusion of categories—although it temporarily resulted in greater protection of advertising than of political speech—caused commercial speech to be unjustifiably discredited when the doctrine of economic substantive due process was properly discarded.

Prior to 1919, the Court treated political speech as subject to the states' police power, power from which economic activities were relatively free. But,

> the Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity . . . . [F]ree trade in ideas became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.

Rudolph J.R. Peritz, *Competition Policy in America, 1888-1992*, at 100 (1996).

Thus, most judicial challenges during this period to restrictions on advertising did not advance First Amendment claims. Rather, they relied on a substantive due process claim that the restrictions interfered with the pursuit of lawful business.[27] For example, in *Halter v. Nebraska*, 205 U.S. 34 (1907), the court upheld a state law barring use of the American Flag on beer bottles. The parties failed to raise a First Amendment challenge, instead relying on a due process claim.[28] State courts

[27] At least two factors may account for this development: the Court had shown a willingness to accept economic substantive due process claims, and it was not until 1931 that it was clear the First Amendment even applied to the states. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).

[28] In a number of later advertising cases, the Court also rejected substantive due process challenges to state and local restrictions on billboard advertising. *See Fifth Avenue Coach Co. v. City of New York*, 221 U.S. 467 (1911); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *St. Louis Poster Advertising Co. v. City of St. Louis*, 249 U.S. 269 (1919); *Packer Corp. v. Utah*, 285 U.S. 105 (1932).

during this period also analyzed, and in many cases invalidated, challenges to advertising regulations under the rubric of substantive due process.[29]

By the time the Court decided *Valentine v. Chrestensen*, 316 U.S. 52 (1942), however, in which it first stated that advertising was outside the protection of the First Amendment, the notion of substantive due process had been rejected, and review of economic legislation reduced to "rational basis" scrutiny.[30] *Valentine*'s dismissive treatment of commercial speech seems most closely linked to the Court's rejection of economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. Thus, what has been said about the Contracts Clause may be said about the protection of commercial speech: "misinterpreted as a form of economic substantive due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded." Doug A. Kmiec & John O. McGinnis, *The*

[29] *See, e.g., Seattle v. Proctor*, 48 P.2d 238, 239 (Wash. 1935) (striking down a city statute compelling businesses to disclose "the number of such . . . [articles] and the lowest price at which each of said articles were offered for sale to the public prior to said advertisement."); *Ware v. Ammon*, 278 S.W. 593, 595 (Ky. Ct. App. 1925) (holding unconstitutional a bar on advertising by dry cleaners without the fire marshal's permission to engage in business); *see also State ex rel. Booth v. Beck Jewelry Enterprises, Inc.*, 41 N.E.2d 622 (Ind. 1942) ("Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment.") (citing cases).

[30] *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("regulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis"); *see also* Yassky, *supra*, at 1729-1730 (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's *Lochner*-style constitutionalization of rights to property and contract). *But see Needham v. Proffitt*, 41 N.E.2d 606, 608 (Ind. 1942) (striking down statute prohibiting funeral directors from advertising under state free speech guarantee).

Contract Clause: A Return to the Original Understanding, 14 Hastings L. Q. 525, 526 (1987).

Thus, the differentiation between commercial and non-commercial speech is properly understood as an outgrowth of twentieth-century disenchantment with property rights and economic liberties, and the mislabeling of advertising as a substantive due process right rather than a First Amendment freedom. The distinction between commercial and non-commercial speech, however, is inconsistent with the text and history of the First and Fourteenth Amendments, as well as with the long-standing "traditions of the American people."

V. THE AGRICULTURE DEPARTMENT'S REGULATION OF COMMERCIAL SPEECH IS PROHIBITED BY THE FIRST AMENDMENT.

Assessed under the level of scrutiny accorded fully protected speech, this becomes an extremely easy case.[31] First, this Court has long held that the government may not require a speaker to endorse or propound a particular view. *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974). Second, the government plainly cannot contend that generic advertising of fruit for the purpose of "stabiliz[ing] the market," Petitioner's Brief at 20, constitutes a compelling governmental interest sufficient to warrant forcing a speaker to endorse a view with which he disagrees. *See Wileman Brothers & Elliott v. Espy*, 58 F.3d 1367, 1377-79 (9th Cir. 1995). Moreover, this program is not possibly sufficiently narrowly tailored to serve the government's interest: there are a myriad of less restrictive alternatives that would not trench on speech at all. Brief of Respondents, Section C; *see Wileman Brothers*, 58 F.3d at 1379-1380.

[31] As the Respondents' brief conclusively demonstrates, however, whether assessed under the *Central Hudson* analysis or *Abood*, the Secretary's program is unconstitutional.

CONCLUSION

For the reasons set forth herein, the Court should affirm the Ninth Circuit's decision. In the process, the Court should make clear that commercial speech is to be accorded the same level of constitutional protection as non-commercial speech.

Respectfully submitted,

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